UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ATTORNEY GENERAL BILL LOCKYER CALIFORNIA ENERGY COMMISSION, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF IOWA, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, STATE OF NEW MEXICO, EX REL. ATTORNEY GENERAL PATRICIA A. MADRID, STATE OF NORTH CAROLINA, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN, and CITY OF NEW YORK, Plaintiffs, -against- SAMUEL W. BODMAN, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY, and UNITED STATES DEPARTMENT OF ENERGY, Defendants.	:	Consolidated Civil Actions 05 Civ. 7807 (JES) and 05 Civ. 7808 (JES) **MEMORANDUM OPINION AND ORDER**
NATURAL RESOURCES DEFENSE COUNCIL, INC., MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS, and TEXAS RATEPAYERS' ORGANIZATION TO SAVE ENERGY, Plaintiffs, -against- SAMUEL W. BODMAN, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY, and UNITED STATES DEPARTMENT OF ENERGY, Defendants.	:	

SPRIZZO, D.J.:

Defendants, the United States Department of Energy and its Secretary, Samuel W. Bodman (collectively the "DOE" or the "Government"), submit this motion for an order modifying the November 7, 2006 Consent Decree (the "Motion") that the Government entered into with Plaintiffs, the State of New York, et al. The Motion seeks a nine-month extension of the final rule setting efficiency standards for certain furnaces and boilers in order to permit the Government to issue a Supplemental Notice of Proposed Rulemaking ("SNOPR") prior to making a final rule. The Plaintiffs in this action submit that the DOE has not established the requisite "good cause" for modifying the Consent Decree, but would be willing to stipulate to the DOE's proposed extension, provided that certain conditions are met.[1] The Gas Appliance Manufacturers' Association ("GAMA"), the Air-Conditioning and Refrigeration Institute ("ACRI"), and the Association of Home Appliance Manufacturers ("AHAM") have opposed it. The joint requests of the Government and GAMA for oral argument is denied, and for the reasons that follow, the Government's Motion is DENIED.

[1] Those conditions are as follows: (1) granting the extension shall not serve as a precedent for the granting of any other requested extensions; (2) the DOE will publish the SNOPR described in the Motion no later than September 30, 2007; (3) the SNOPR proposes an effective date for the final rule that is no later than January 1, 2015; and (4) the SNOPR addresses the three topics that the DOE states in the Motion merit further consideration by the Agency. See Pls.' Response to the DOE's Mot. for Modification of Consent Decree, at 2.

I. BACKGROUND

A) Factual Background and Procedural History

In 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA") in order "to conserve energy supplies" and "to provide for improved energy efficiency of . . . major appliances . . . ." 42 U.S.C. § 6201(4)-(5). In addition, the EPCA's appliance efficiency provisions have the goal "of steadily increasing the energy efficiency of covered products." NRDC v. Abraham, 355 F.3d 179, 197 (2d Cir. 2004). Thus, the EPCA requires that certain residential and commercial equipment meet minimum energy efficiency standards that are established by Congress in the statute or prescribed by the DOE pursuant to the statute. See, e.g., 42 U.S.C. §§ 6295, 6313 & 6317. Because technology improves over time, the EPCA requires the DOE to issue periodic revisions, or updates, to existing standards. In particular, the EPCA requires the DOE to undertake successive rulemakings concerning revised efficiency standards and sets express deadlines by which the DOE must issue final rules.

The Motion concerns the current September 30, 2007 deadline (the "Existing Deadline") for the DOE to publish a final rule establishing amended energy conservation standards for residential furnaces and boilers.[2] The EPCA's original deadline

[2] Given the pendency of the Motion, originally filed August 3, 2007, the Court issued an order staying the September 30, 2007 deadline for the DOE to promulgate a final rule in the Federal Register until seven calendar days after the date on which the Court rules on the Motion. If the Court does not

for a final rule was January 1, 1994. See 42 U.S.C. § 6295(f)(3)(B). In May 2001, the DOE published a schedule indicating that it intended to publish the final rule in 2003 instead. See 66 Fed. Reg. 25,365, 25,369 (May 14, 2001). Seven months later, the DOE published a new schedule stating that it would complete the rule in 2004. See 66 Fed. Reg. 61,125, 61,160-61 (Dec. 3, 2001). In 2003, the DOE published a third schedule, moving the completion date to September 2005. See 68 Fed. Reg. 72,401, 72,467-68 (Dec. 22, 2003). In 2004, the DOE published a fourth schedule moving the completion date to September 2007, thirteen years after the EPCA's original deadline. See 69 Fed. Reg. 72,663, 72,712-13 (Dec. 13, 2004).

On September 7, 2005, Plaintiffs filed two EPCA citizen suits in this Court alleging that the DOE has failed to comply with the EPCA's deadlines for publishing final rules concerning energy efficiency standards for twenty-two categories of products, including furnaces and boilers. See Compl., dated Sept. 7, 2005 (05 Civ. 7807); Compl., dated Sept. 7, 2005 (05 Civ. 7808). The Court consolidated the two actions on December 6, 2005. See Order, dated Nov. 30, 2005 (05 Civ. 7807, 05 Civ. 7808). Subsequently, the AHAM was permitted to intervene as a Defendant-Intervenor, and the GAMA and the ACRI were permitted to

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rule on the Motion on or before November 1, 2007, the DOE must issue a final rule within seven calendar days thereof, or seek further modification of the Consent Decree or other appropriate relief from the Court.

intervene as Plaintiffs-Intervenors. See Order, dated Dec. 16, 2005 (05 Civ. 7807, 05 Civ. 7808); Order, dated Dec. 27, 2005 (05 Civ. 7807, 05 Civ. 7808).

B) The Consent Decree

On November 7, 2006, this Court entered a Consent Decree resolving the complaints in this action. See Decl. of Pierre G. Armand, dated Aug. 3, 2007 ("Armand Decl."), Ex. A. In the Consent Decree, the parties agreed that "it is in the best interests of the public, the parties and judicial economy to resolve these consolidated actions without further litigation" and that "the actions can be resolved by a binding schedule governing the completion of Energy Efficiency Rules, as set forth in this Consent Decree." See Consent Decree ¶ 19. The Consent Decree set forth a schedule pursuant to which the DOE was required to publish final rules providing amended energy efficiency standards for the twenty-two categories of products. Id., § III, ¶ 1. With respect to furnaces and boilers, the Consent Decree required the DOE to publish the final rule on or before September 30, 2007. Id. The Consent Decree provided that it could "be modified by (a) written stipulation of the parties, or (b) the Court, pursuant to a motion by any party, for good cause shown . . . ." Id., § V, ¶ 1.

C) The Final Rule Regarding Residential Furnaces and Boilers

On July 29, 2004, the DOE published an Advanced Notice of

Proposed Rulemaking ("ANOPR") pertaining to energy conservation standards for residential furnaces and boilers. See 69 Fed. Reg. 45,420 (July 29, 2004). The ANOPR described the analyses that the DOE expected to perform and requested data for use in the rulemaking. Id.

On October 6, 2006, the DOE published a Notice of Proposed Rulemaking ("NOPR") that proposed amending the energy conservation standards for residential furnaces and boilers. See 71 Fed. Reg. 59,204 (Oct. 6, 2006). On October 30, 2006, the DOE held a public meeting for interested parties to provide comments and to discuss issues relevant to the NOPR. See Decl. of David E. Rodgers, dated Aug. 3, 2007 ("Rodgers Decl.") ¶ 13. On February 9, 2007, the DOE published a notice of data availability and reopening of the comment period in order to address questions posed by stakeholders at the public meeting and to provide an opportunity for the public to review and comment on the DOE's response to each question. See 72 Fed. Reg. 6184 (Feb. 9, 2007). In response to the NOPR and the notice of data availability, the DOE received over forty comments from stakeholders. See Rodgers Decl. ¶ 15.

On May 4, 2007, the DOE filed a Report on Status of Rulemaking Activity with the Court (the "May 2007 Report"). See Armand Decl., Ex. B. In the May 2007 Report, the DOE advised the Court that it was considering the comments to the NOPR and notice

of data availability, and that the final rule was on schedule for publication on or before September 30, 2007. Id. at 2.

After completing its initial analysis of the comments received in response to the NOPR and notice of date availability, the DOE determined that it wished to give further consideration to three issues, discussed *infra*, that were raised in the comments. See Rodgers Decl. ¶¶ 17-18, 23. By filing the Motion, the DOE seeks a modification of the Consent Decree that would permit a nine-month extension of the Existing Deadline, from September 30, 2007 until June 30, 2008. Id. ¶ 24. The DOE seeks this extension in order to permit it to issue a SNOPR seeking further comment on these three issues. Id.

On August 24, 2007, the Plaintiffs filed a response to the Motion and the Plaintiffs-Intervenors and Defendant-Intervenor filed oppositions to the Motion. On September 25, 2007, the Court entered an order that the September 30, 2007 deadline for the Defendants to issue the final furnace and boiler rule was to be stayed until seven calendar days after the date on which the Court enters an order resolving the Motion.

II. DISCUSSION

A) Standards for Modification of a Consent Decree

The Supreme Court has described a consent decree as an agreement between the parties to a case "after careful negotiation has produced agreement on [its] precise terms." Local

No. 93 v. City of Cleveland, 478 U.S. 501, 522 (1986) (internal quotations omitted). Generally, the amendment of a consent decree is not favored. While a federal court has the authority to modify judgments due to changed circumstances, modification by the court should be exercised with special caution when the judgment at issue is a consent decree by the parties. See, e.g., W.L. Gore & Associates, Inc. v. C.R. Bard, Inc., 977 F.2d 558, 561 (Fed. Cir. 1992) ("[w]hen litigation is ended by the deliberate choice of the parties, a movant's burden for modification of a consent order is particularly heavy . . . ."); see also Bellevue Manor Associates v. United States, 165 F.3d 1249, 1253 n.4 (9th Cir. 1999).

In this case, the DOE relies on Section V of the Consent Decree, which states that it may be modified "pursuant to a motion by any party, for good cause shown . . . ," see Consent Decree § V, ¶ 1, as well as Rule 60(b) of the Federal Rules of Civil Procedure, which authorizes the court to modify a final judgment where "it is no longer equitable that the judgment should have prospective application" or "any other reason justif[ies] relief from the operation of the judgment." See Fed. R. Civ. P. 60(b).

To justify modifying a consent decree under Rule 60(b), the party seeking modification bears the initial burden of establishing a significant change in factual or legal

circumstances, which cause the unmodified consent decree or its enforcement to be "substantially more onerous," "unworkable because of unforeseen obstacles," or "detrimental to the public interest." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-84 (1992); see also Bldg & Constr. Trades Council of Phila. v. NLRB, 64 F.3d 880, 886 (3d Cir. 1995). If the moving party demonstrates such a significant change in factual circumstances, the court must then consider "whether the proposed modification is suitably tailored to the changed circumstances." Rufo, 502 U.S. at 391. When a party seeks to modify a consent decree based "upon events that actually were anticipated at the time it entered into a decree," the modification should be denied. Id. at 385.

B) Defendant Has Not Demonstrated a Significant Change of Circumstances Warranting Modification of the Consent Decree

The DOE relies on three alleged changes in factual circumstances to support its Motion for Modification of the Consent Decree: (1) commenters' critique of the DOE's decision in the NOPR to exclude consideration of the potential impact of higher efficiency standards for gas-fired products on natural gas prices; (2) commenters' requests that the DOE consider a more stringent 90-percent annual fuel utilization efficiency ("AFUE") standard level for non-weatherized gas furnaces; and (3) commenters' concerns with a waiver procedure addressed in the

NOPR that would allow states to seek a waiver from federal preemption of state and local energy conservation standards. See Rodgers Decl. ¶¶ 17-18, 23.

1) Potential Impact of Higher Efficiency Standards for Gas-Fired Products on Natural Gas Prices

In the NOPR, the DOE declined to consider whether higher efficiency standards would result in lower natural gas prices in the future. See 71 Fed. Reg. at 59,208. The DOE explained that its review of a recent study revealed that "there is no conclusive evidence that furnace and boiler standards will affect overall natural gas prices" and that it was impossible "to estimate the possible impact of energy conservation standards on utility prices." Id.

Commenters criticized the DOE's decision not to consider the potential impact of higher efficiency standards for gas-fired products on natural gas prices, and challenged the DOE's determination that there is no reliable method for estimating the magnitude of the impact on average retail prices. See Rodgers Decl. ¶ 18b. Specifically, Plaintiff Natural Resources Defense Council, and non-party Dow Chemical Company, commented that the DOE could utilize a National Energy Modeling System ("NEMS") model to assess the potential impact. Id.; see also id., Ex. 9 (Comments of the Natural Res. Def. Council & The Dow Chem. Co., No. 132 at 7). In light of these comments, the DOE would like to revisit its decision, and has been preparing initial natural gas

price impact analyses, which have not yet been completed or published. See Rodgers Decl. ¶ 21.

The DOE argues that further consideration of these newly developed data and studies would require it to rely on assumptions and analyses that it had not previously made available for public comment. Id. While those new studies and data may prove helpful, the possibilities of obtaining new data and conducting new studies naturally arise in every rulemaking. Further, absent its newly developed data and studies, the DOE does not deny that it has a sufficient scientific and legal basis for issuing a final rule; rather, the DOE lacks the basis for the issuance of the "more effective and comprehensive final rule" that it wishes to issue. See Mem. of Law in Supp. of Defs.' Mot. for Modification of Consent Decree, at 18, fn. 5.

While the public has an interest in the development of the most effective and comprehensive energy conservation regulation possible, the public also has an interest in the speedy promulgation of a final rule. The EPCA established deadlines, which expired long ago. Additionally, the very purpose of the Consent Decree was to establish that despite the marginal benefit of continuing delays the DOE accepted that a decision must be reached by dates certain. The DOE had the past thirteen years to develop new data and conduct studies, and Plaintiffs are entitled to a final rule on the date agreed upon.

Since the DOE does not deny that it has a sufficient scientific and legal basis to issue a final furnace and boiler rule at this time, compliance with the unmodified Consent Decree would not harm the public interest. Moreover, the DOE has not demonstrated that the unmodified Consent Decree is unworkable because of unforeseen obstacles or that compliance with it is substantially more onerous on account of this newly developed data and these studies. Thus, for these reasons, the DOE has failed to meet its burden of showing that the commenters' critique of the DOE's decision not to consider the potential impact of higher efficiency standards for gas-fired products on natural gas prices is a changed circumstance sufficient to justify modification of the Consent Decree.

2) A 90-Percent AFUE Standard Level for Non-Weatherized Gas Furnaces

In the NOPR, the DOE evaluated a range of efficiency levels for residential furnaces and boilers. See Rodgers Decl. ¶ 9. As a result, the DOE proposed a trial standard level, measured by percent of AFUE, of 80-percent for non-weatherized gas furnaces. Id.; 71 Fed. Reg. at 59,205. The DOE specifically rejected a 90-percent AFUE level for non-weatherized gas furnaces, indicating that higher standards would not be "economically justified." Rodgers Decl. ¶ 10; 71 Fed. Reg. at 59,250-51.

Several commenters requested that the DOE consider a more stringent 90-percent AFUE standard level for non-weatherized gas

furnaces. Rodgers Decl. ¶ 18c. The comments asserted, *inter alia* that: "(i) the proposed 80-percent AFUE standard would provide little or no benefit for all consumers and would produce very modest energy savings, far smaller than those resulting from a 90-percent AFUE standard; and (ii) the net national impacts of a 90-percent AFUE standard would be positive." Id.

As a result of these comments, the DOE would like to consider whether the AFUE standard level for non-weatherized gas furnaces proposed in the NOPR, and commenters' requests to consider a more stringent 90-percent AFUE level, merit reexamination. Id. The DOE argues that the public was not put on notice that the 90-percent level was under consideration, and therefore did not have an adequate opportunity to comment on the 90-percent level. Id. ¶ 22.

It is clear, however, that the public was fully apprised of this issue. At the pre-motion conference, the Plaintiffs fully concurred. See Pre-Motion Conference, dated July 31, 2007 at 8 (Mr. Harak, attorney for Plaintiffs, the Texas Ratepayers' Organization to Save Energy and the Massachusetts Union of Public Housing Tenants, noted that "there have been three rounds of comments already on two of the three issues that [Mr. Armand] has discussed . . . [and] there were comments on the 90 percent standard"). The DOE acknowledges that it had already received public comments on this issue long before June of 2007.

See Rodgers Decl., Ex. 2, at V (consumer groups calling for 90-percent AFUE standard); Ex. 3 at 18 (NRDC calling for 90-percent AFUE standard); Ex. 10 (City of Boston calling for 90-percent standard). The 90-percent standard was discussed numerous times in the rulemaking. See Decl. of Joseph M. Mattingly, dated Aug. 24, 2007 ("Mattingly Decl.") ¶¶ 19-30 (and exhibits cited therein). The 90-percent AFUE standard has been exhaustively explored, and a third round of comments is not required.

In light of the extensive discussion and rejection of the 90-percent standard, it is clear to me that enforcement of the unmodified Consent Decree would not be substantially more onerous or unworkable due to unforeseen obstacles. Defendants have failed to establish that publication of a final rule regarding the AFUE standard level on the Existing Deadline would harm the public interest. For these reasons, the DOE has failed to meet its burden of showing that the comments requesting that it consider a more stringent 90-percent AFUE standard for non-weatherized gas furnaces is a "changed circumstance" sufficient to justify modification of the Consent Decree.

3) State Waiver from Federal Preemption of State and Local Energy Conservation Standards

In response to comments in the ANOPR suggesting the establishment of regional standards to capture potential energy savings for Northern consumers, the DOE noted in the NOPR that the EPCA allows states to seek a waiver from federal preemption

of state and local energy conservation standards. See 71 Fed. Reg. at 59,209-10. The DOE anticipated that the waiver procedure could yield significant energy savings outside of the rulemaking if states successfully obtained waivers of the federal standard and imposed more stringent energy conservation standards. Rodgers Decl. ¶ 18a.

Commenters expressed concerns regarding: "(i) the difficulty and impracticality of states seeking waivers; (ii) the possibility that the DOE will deny many of the waiver petitions; and (iii) the potential burden on industry if states were granted waivers that produced a 'patchwork' of standards." Id.

The DOE argues that it "did not anticipate that the aforementioned comments would cause [it] to consider rethinking the NOPR's emphasis on waivers . . . ." See Mem. of Law in Supp. of Defs.' Mot. for Modification of Consent Decree, at 11. When the Consent Decree was signed in November 2006, the DOE knew that comments would soon be filed[3] and that the Agency would have to consider whether the rule it proposed on October 6, 2006 should be revised accordingly. Rulemakings almost always include challenges to important assumptions as well as legal and analytical concepts. The fact that many comments disagree with the DOE's preliminary conclusions in the NOPR or result in

[3] The deadline for filing comments was January 15, 2007. 71 Fed. Reg. at 59,204.

modification of the proposed regulation is not a sufficient basis for extending the deadline.

The DOE further alleges that it discussed the waiver procedure for the first time in the NOPR. Rodgers Decl. ¶ 20. It argues that "any reconsideration of the emphasis placed on the waiver process and its potential impact on energy standards should be published in order to solicit comments from all interested parties." See Mem. of Law in Supp. of Defs.' Mot. for Modification of Consent Decree, at 10. The DOE does not deny, however, that this issue has been a lively subject of debate for years. It acknowledges that it had already received public comments on this issue long before June of 2007. Rodgers Decl., Exs. 1-3. Moreover, a decision to withdraw an existing proposal, such as the state waiver procedure, in light of negative comment is within the logical span of the current NOPR. If comments convince the DOE that its proposal is flawed, the Agency should withdraw the proposal. A third round of public comment is not necessary.

The fact that comments have caused the DOE to reconsider the NOPR's emphasis on state waivers is not an unforeseen obstacle. Furthermore, the DOE has not demonstrated that the comments it received regarding the state waiver procedure make compliance with the unmodified Consent Decree substantially more onerous or detrimental to the public interest. Thus, for these reasons, the

DOE has failed to meet its burden of showing that the commenters' critique of a state waiver procedure is a changed circumstance sufficient to justify modification. Since the DOE has not satisfied its initial burden, this Court need not address whether the DOE's proposed modification is suitably tailored to the changed circumstances.

C) Defendant Has Not Demonstrated Equitable Factors Which Warrant Modification of the Consent Decree

Courts are authorized to relieve a party from the effects of a consent decree if "it is no longer equitable that the judgment should have prospective application." Kozlowski v. Coughlin, 871 F.2d 241, 246 (2d Cir. 1989) (internal quotations omitted). The DOE places a considerable amount of emphasis on Cronin v. Browner, 90 F. Supp. 2d 364 (S.D.N.Y. 2000), which involved a motion filed by the EPA to modify a consent decree. See Mem. of Law in Supp. of Defs.' Mot. for Modification of Consent Decree at 16-18. In Cronin, the court rejected the EPA's changed circumstances as anticipated and/or insufficient to render the decree onerous, but found that enforcing the then-existing deadlines of the decree would harm the public interest because the EPA could not promulgate a scientifically and legally defensible regulation by the deadline. Id. at 371, 374. By contrast, here the DOE does not deny that it has a sufficient scientific and legal basis for issuing a final rule at this time. See Mem. of Law in Supp. of Defs.' Mot. for Modification of

Consent Decree at 18. Rather, here the DOE merely argues that such a rule would not be the "most comprehensive and effective rule possible . . . ." Id. The issuance of a final rule at this point, regardless of whether it was the "most comprehensive and effective rule possible," would not harm the public interest.

The DOE additionally argues that, even if these circumstances were anticipated, it nonetheless satisfies the standard articulated in Inmates of Suffolk County Jail v. Rufo because it agreed to the Consent Decree in good faith and has made a reasonable effort to comply with its terms.[4] However, as articulated above, the delays due to public comments were foreseeable. Thus, the Court is not convinced that the DOE has satisfied its "heavy burden" of demonstrating that it agreed to the Consent Decree in good faith and made a reasonable effort to comply with its terms.

III. CONCLUSION

The DOE has not satisfied its burden of showing a significant change in factual or legal circumstances which

[4] Defendants cite Rufo, which states that where "it is clear that a party anticipated changing conditions," that party has a heavier burden to demonstrate that "it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." 502 U.S. at 385. Although the Rufo court suggests that good faith compliance with the decree can be one avenue for overcoming the general requirements for modification of a consent decree, the courts clearly did not find sufficient good faith by the movant in that case. Id. Ultimately, the district court on remand refused to modify the consent decree. Inmates of Suffolk County Jail v. Rufo, 148 F.R.D. 14, 25 (D. Mass. 1993). In fact, Defendants fail to cite any case from this Circuit or any other circuit which has modified a consent decree on that basis.

warrants modification of the Consent Decree; nor do equitable factors warrant modification of the Consent Decree. The public has been fully apprised of all issues and has been given ample opportunity for comment. Accordingly, the DOE's Motion to Modify the Consent Decree is DENIED.

Defendants have seven calendar days to finalize a final rule establishing amended energy conservation standards for residential furnaces and boilers.

SO ORDERED.

DATED: New York, New York
October 30, 2007

FOR John E. Sprizzo
United States District Judge

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